No. 92-1292

(10)

FILED
MAY 28 1993
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

---

LUTHER CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,

*Petitioners,*

v.

ACUFF-ROSE MUSIC, INC.,

*Respondent.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

---

## BRIEF AMICUS CURIAE OF THE HARVARD LAMPOON, INC. IN SUPPORT OF PETITIONERS

---

ROBERT H. LOEFFLER*
JONATHAN BAND
MORRISON & FOERSTER
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006
(202) 887-1500

*Counsel for*
*The Harvard Lampoon, Inc.*

**Counsel of Record*

Dated: May 28, 1993

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| STATEMENT OF INTEREST | 2 |
| SUMMARY OF ARGUMENT | 4 |
| ARGUMENT | 4 |
| I. THE SIXTH CIRCUIT FAILED TO WEIGH PARODY'S SIGNIFICANCE TO THE PROGRESS OF THE ARTS | 5 |
| II. COMMERCIAL PARODIES SHOULD NOT BE PRESUMED TO HAVE A HARMFUL MARKET IMPACT | 12 |
| CONCLUSION | 16 |

## TABLE OF AUTHORITIES


**Cases** Page

*Acuff Rose Music, Inc. v. Campbell*, 972 F.2d 1429 (6th Cir. 1992) ..... *passim*

*Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) ..... 11

*Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d at 693 (2d Cir. 1992) ..... 10

*Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980) ..... 12

*Feist Publications, Inc. v. Rural Telephone Service Co.*, 111 S. Ct. 1282 (1991) ..... 10

*Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539 (1985) ..... 10,14

*Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458 (5th Cir.), *cert. denied*, 111 S. Ct. 374 (1990) ..... 10

*National Lampoon, Inc. v. American Broadcasting Cos., Inc.*, 376 F.Supp. 733 (S.D.N.Y.), *aff'd*, 497 F.2d 1343 (2d Cir. 1974) ..... 3

*Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ..... 4,12,13,14

*Stewart v. Abend*, 495 U.S. 207 (1990) ..... 11,14

*Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir. 1980) ... 10

*Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975) ..... 4

*White v. Samsung Elecs. Am., Inc.*, No. 90-55840, 1991 WL 73915 (9th Cir. Mar. 18, 1993) ..... 8,9,10

**Statutes and Legislative Materials**

17 U.S.C. § 107 ..... *passim*

17 U.S.C. § 115(a)(2) ..... 15




## Table of Authorities Continued


Page

H. Rep. No. 1476, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659 ..... 11

S. Rep. No. 473, 94th Cong. 1st Sess. (1975) ..... 15

**Other Authorities**

Arnold J. Band, *Swallowing Jonah: The Eclipse of Parody*, 10 Prooftexts 177 (1990) ..... 6,7

Julie Bisceglia, *Parody and Copyright Protection: Turning the Balancing Act Into A Juggling Act*, 34 ASCAP Copyright Law Symposium 1 (1987) ..... 9,11,14

William W. Fisher, III, *Reconstructing the Fair Use Doctrine*, 101 Harv. L. Rev. 1661 (1988) ..... 12

Paul Goldstein, *Copyright: Principles, Law and Practice* (1989) ..... 15

Linda Hutcheon, *A Theory of Parody* (1985) ..... 8,9

Walter Isaacson, *Kissinger: A Biography* (1992) ... 3

Craig Lambert, *Comic Sutra*, Harvard Magazine, July-August 1992 ..... 3

Dwight MacDonald, *Parodies* (1960) ..... *passim*

Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 Harv. L. Rev. 1395 (1984) ..... 12,14,15

William F. Patry, *The Fair Use Privilege in Copyright Law* (1985) ..... 13

S. Eric Rayman & James M. Downey, *100 Years of Harvard Lampoon Parodies* (1976) ..... 2,3

Beth W. Van Hecke, *But Seriously Folks: Toward a Coherent Standard of Parody as Fair Use*, 77 Minn. L. Rev. 465 (1992) ..... 13,15

Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 Harv. L. Rev. 1137 (1990) ..... 13

**Table of Authorities Continued**


| | Page |
|---|---|
| Leon R. Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 Can. Bar Rev. 1130 (1955) | 6,7,8 |
| Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. Colo. L. Rev. 79 (1991) | 9,11,15 |


IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

---

**No. 92-1292**

---

LUTHER CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,

*Petitioners,*

v.

ACUFF-ROSE MUSIC, INC.,

*Respondent.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

---

**BRIEF AMICUS CURIAE OF THE HARVARD LAMPOON, INC. IN SUPPORT OF PETITIONERS**

---

The Harvard Lampoon, Inc. submits this brief as *amicus curiae* and respectfully suggests that the Court reverse the decision below. The letters of consent of Petitioners and Respondent are being filed with this brief.

## STATEMENT OF INTEREST

The Harvard Lampoon, Inc. (the "Lampoon") publishes the nation's oldest college humor magazine, the *Harvard Lampoon*, which first appeared in 1876. S. Eric Rayman & James M. Downey, *100 Years of Harvard Lampoon Parodies* (1976). Literary parodies frequently appear in the magazine's five annual issues; William Shakespeare, Lewis Carroll, and A.A. Milne have all been lampooned by the *Harvard Lampoon*. *Id.* at 4. The Lampoon also publishes parodies of national magazines or newspapers, mimicking the appearance and writing style of the original. Since 1911, the Lampoon has published parodies of *Life*, *The Saturday Evening Post*, *Vanity Fair*, *Popular Mechanics*, *Lady's Home Journal*, *Town and Country*, *Esquire*, *Newsweek*, *The New Yorker*, *Mademoiselle*, *Time*, *The New York Times*, *Sports Illustrated*, and *USA Today*. The Lampoon has produced a book length parody of J.R.R. Tolkien's *Lord of the Rings* (entitled *Bored of the Rings*), and two sound recordings of popular songs. *Id.*

The 1966 parody of *Playboy*, the first Lampoon parody to be distributed nationally, sold a half million copies. *Id.* at 5. In 1972, after *Cosmopolitan* featured the actor Burt Reynolds as the first nude male centerfold, the Lampoon published a parody of *Cosmopolitan* with a photo-montage of Henry Kissinger as its centerfold. *Id.* at 6. The edition sold more than a million copies, and the centerfold was reprinted in Saigon's largest newspaper the day Kissinger arrived in South Vietnam with the Paris peace plan. President Thieu reportedly believed that Kissinger had posed for the picture, and Leonid Brezhnev pinned it up in his office. Walter Isaacson, *Kissinger: A Biography* 363 (1992).[1]



After graduation from Harvard College, former Lampoon editors continue to perpetrate parodies. In 1970, three Lampoon editors licensed the Lampoon's name and established an independent humor magazine, the *National Lampoon*. *See National Lampoon, Inc. v. American Broadcasting Cos., Inc.*, 376 F.Supp. 733, 737 (S.D.N.Y.), *aff'd*, 497 F.2d 1343 (2d Cir. 1974). Former Lampoon editors write and produce major television comedy shows, including *Saturday Night Live*, *The Bill Cosby Show*, and *The Simpsons*. *See* Craig Lambert, *Comic Sutra*, Harvard Magazine, July-August 1992, at 24-40. Indeed, Conan O'Brien, NBC's designated replacement for David Letterman, is a former Lampoon president.[2]

In short, parody is the life-blood of the Lampoon, just as it is the stock-in-trade of many other college humor magazines. Although the Sixth Circuit's decision directly threatens only "commercial" parodies, the term commercial is so vague and over-broad that the Sixth Circuit's decision will have a chilling effect on all parodists. For this reason, the Lampoon files the first *amicus* brief in its history.

---

[1] For the record, the Lampoon has never parodied an opinion of the Court. However, it once satirized the selection process for Supreme Court Justices. 1969 *Time* parody, *reprinted* in Rayman & Downey, *supra*, at 142.

[2] Another Lampoon alumnus, Levin Hicks Campbell, was appointed by President Nixon to the U.S. Court of Appeals for the First Circuit. Some Lampoon alumni, however, have not fared as well. Elliot L. Richardson, for example, had difficulty holding onto a job during the Nixon administration.

## SUMMARY OF ARGUMENT

This brief addresses two narrow points. First, it highlights the central role that parody plays in the progress of the arts—a role the court below improperly overlooked. Second, this brief urges the Court to clarify that the presumption first announced in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), that commercial uses are harmful to the market for the copyrighted work, does not apply to parodies.

## ARGUMENT

Parody almost inevitably requires the copying of protected expression. If there were no fair use doctrine, virtually every unauthorized parody of a copyrighted work would infringe.

This case required the Sixth Circuit to balance two competing tenets of the fair use doctrine: that parody occupies a favored niche in Section 107's design and that "commercial" uses are presumptively harmful to the market for the copyrighted work. Instead of carefully weighing these competing tenets, the Sixth Circuit shortchanged the first and put a heavy thumb on the scale for the second. Almost every case in which a parodist has invoked the fair use defense has involved a commercial use; to give such preemptive weight to the fact of commercial use would eliminate the parody defense. The resulting suppression of parody would contradict the ultimate purpose of the Copyright Act, which the Court has recognized as "promoting broad public availability of literature, music, and the other arts." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).



Judge Nelson's cogent dissent identifies the errors of the decision below. *Acuff Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1439-46 (6th Cir. 1992) (J. Nelson, dissenting). This brief amplifies two of Judge Nelson's observations. First, the brief shows how, as a significant art form, parody deserves a favored status under Section 107 that the copyright law should promote, not suppress. Second, the brief suggests that the court below gave an overly broad scope to the presumption that "commercial" uses have a harmful market impact.

### I. THE SIXTH CIRCUIT FAILED TO WEIGH PARODY'S SIGNIFICANCE TO THE PROGRESS OF THE ARTS

The decision below acknowledged that parody deserves preferred treatment under Section 107's first factor, the purpose and character of the use. 972 F.2d at 1435. However, in evaluating this factor, the Sixth Circuit failed to attach the same valence to Petitioners' parodic purpose as it did to the commercial nature of the use. In a word, the Sixth Circuit did not take parody seriously.

Judge Nelson's dissent, by contrast, took parody very seriously, and discussed at length the case law reflecting parody's favored status under Section 107. 972 F.2d at 1440-42. The briefs of Petitioners and their other *amici* explore one of the rationales for this status: the significance of parody to political discourse. Here the Lampoon wishes to highlight another—and arguably the central—rationale for parody's favored status: the significance of parody to the progress of the arts.

Parody has existed in many societies, and has been recognized as a distinct artistic creation almost from

the beginning of literature. *See* Leon R. Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 Can. Bar Rev. 1130, 1133 (1955). Homer appears to have been the first target of parody: "The rhapsodists who strolled from town to town to chant the poems of Homer were immediately followed by another set of strollers—buffoons who made the audiences merry by the burlesque turn which they gave to the solemn strains." Dwight MacDonald, *Parodies* 562 (1960) (quoting Isaac D'Israeli, *Curiosities of Literature*). In *Batrochomyomachia*, for example, frogs and mice battled as if they were Homeric heroes. *Id.* Aristotle referred to Hegamon of Thasos as "the inventor of parodies" for his play *Gigantomachia*, a Homeric parody celebrating the victorious exploits of what was actually an Athenian defeat in the Syracusan expedition. Yankwich, *supra*, at 1133; MacDonald, *supra*, at 562. Greek parody reached its zenith with Aristophanes, who mocked the philosophy and style of Aeschylus, Euripides and Socrates in *The Frogs* and *The Birds*. *Id.*

Although it was once believed that parody did not "appeal[] to the ancient Hebrews," MacDonald, *supra*, at 562, recent scholarship has concluded that the Book of Jonah was written originally as a parody of prophetic literature specifically and biblical literature generally. *See, e.g.*, Arnold J. Band, *Swallowing Jonah: The Eclipse of Parody*, 10 Prooftexts 177 (1990). The book's situations (a big fish swallowing a prophet!), puns, inversions, and exaggerations suggest that the text produced in the fifth century B.C.—at about the same time as Aristophanes' plays—was understood by contemporary readers to be a parody of earlier biblical texts. During the two or three centuries between the



creation and the canonization of the book, "the audience changed and its capacity to grasp the parodistic elements in the text diminished, even disappeared." *Id.* at 191. Because "parody must include a pretext," it is "susceptible to 'misunderstanding.'" *Id.* at 192. Moreover, during the canonization process, the rival factions "consciously or unconsciously . . . shaped the image of the prophet according to their views." *Id.* Thus, "the canonizing community could swallow the Book of Jonah just as the big fish had swallowed Jonah himself." *Id.* at 194. Without parody, a powerful holy text read in synagogues on the Day of Atonement and representing for Christians a prefiguration of the Resurrection might never have been created. *Id.* at 183.

The Romans produced many parodies, often focusing on Virgil. Yankwich, *supra*, at 1134. During the Middle Ages, parodies of the Scriptures and the Mass were popular. *Id.* The fourteenth and fifteenth centuries produced parodies of legal decisions involving religious figures. *E.g.*, Bartolo of Saxoferrato, *Processus Satanae Contra Virginem Coram Justice Jesus* ("Satan's suit against the Virgin, heard before Judge Jesus"). In the seventeenth century, Cervantes wrote *Don Quixote* as a parody on the Spanish novel of chivalry, and in the process created one of literature's most memorable metaphors—tilting at windmills. Yankwich, *supra*, at 1134. Moreover, Cervantes' characterizations inspired one of Picasso's most evocative paintings.

Starting with Geoffrey Chaucer, almost every major British author has written parodies, including Ben Jonson, Alexander Pope, William Shakespeare, Jonathan Swift, Daniel Defoe, Henry Fielding, Jane Aus-

ten, Samuel Johnson, John Keats, Lord Byron, and Lewis Carroll. MacDonald, *supra*, at xvii-xxiii. One of the richest novels written in English, James Joyce's *Ulysses*, is a parody of Homer's *The Odyssey*.

On this side of the Atlantic, Bret Harte parodied James Fenimore Cooper, John Updike (a former Lampoon president) parodied Jack Kerouac, and virtually everyone, including the Lampoon, has parodied Ernest Hemingway. A major forum for American parody, in addition to the Lampoon, has been *The New Yorker* magazine, which has published parodies by Robert Benchley (another former Lampoon president), S.J. Perleman, James Thurber, and E.B. White. MacDonald, *supra*, at 567.

Parody, of course, is not restricted to literature. Bach, Mozart, and Beethoven have all been parodied, as well as the *Mona Lisa*, *The Last Supper*, and the works of Picasso and Vermeer. Linda Hutcheon, *A Theory of Parody* 8 (1985). Much of postmodern architecture is parodic, *id.* at 11, and films are also fertile grounds for parody (*e.g.*, Woody Allen's parody of *Casablanca* in *Play it Again Sam*). *Id.* at 25; *see also White v. Samsung Elecs. Am., Inc.*, No. 90-55840, 1993 WL 73915 at *8, n.25 (9th Cir. Mar. 18, 1993) (J. Kozinski, dissenting).

Parodies progress in cycles. Shakespeare parodied Marlowe, then Marston parodied Shakespeare; Hemingway parodied Sherwood Anderson, then E.B. White parodied Hemingway; *Star Wars* parodied *The Wizard of Oz*, then Mel Brooks parodied *Star Wars* in *Spaceballs*.[3] Yankwich, *supra*, at 1135; MacDonald,

[3] The 2 Live Crew also parodies *Star Wars*; one of its member's pseudonym is Luke Skyywalker, and its record company is Luke Skyywalker Records (Luke Skywalker is the hero of *Star Wars*).



*supra*, at 560-61; Hutcheon, *supra*, at 27; *White*, 1993 WL 73915 at *8, n.25.

In recent years, an extensive scholarly bibliography concerning parody has developed. *See, e.g.*, Hutcheon, *supra*, at 118-135. Parody is recognized

> as an intuitive kind of literary criticism, shorthand for what "serious" critics must write out at length. It is Method acting, since a successful parodist must live himself, imaginatively, into his parodee. It is jiujitsu, using the impetus of the opponent to defeat him . . . .

MacDonald, *supra*, at xiii. *See also* Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. Colo. L. Rev. 79, 91-92 (1991); Julie Bisceglia, *Parody and Copyright Protection: Turning the Balancing Act Into A Juggling Act*, 34 ASCAP Copyright Law Symposium 1, 4 (1987).

The role of parody may be evolving. One of the leading theorists of parody writes that "parody in the twentieth century has gone beyond [the] conservative function of keeping modishness in line . . . ." Hutcheon, *supra*, at 2. Thus, parody is now understood as "one of the ways in which modern artists have managed to come to terms with the weight of the past." *Id.* at 29. Further, "parody in this century is one of the major modes of formal and thematic construction of texts." *Id.* at 2; *see also* Bisceglia, *supra*, at 5, 33-36. Another student of parody notes that

> [A]n elderly culture like ours is suffused with parody. We are self-conscious, we have the historical sense, we look back on the past. Our avant garde has done a lot of its fighting in the rear. *Ulysses* is a museum of prose styles, *Finnegan's Wake* a course in advanced philology, *The Waste Land* echoes with quotations. Bartok and Stravinsky are archaeologists as well as inventors .... Picasso steals everywhere—from African sculpture, Greek vases, High and Low Renaissance, and above all, from Picasso; his own fence, he disguises the hot jewels in new settings; his parodic talent amounts to genius .... We are backward-looking explorers and parody is a central expression of our times.

MacDonald, *supra*, at xv.

In *Feist Publications, Inc. v. Rural Telephone Service Co.*, 111 S. Ct. 1282, 1289-90 (1991), the Court suggested that it may seem unfair or unfortunate that the fruit of an author's labor may be used by others without compensation, but emphasized that this was "the means by which copyright advances the progress of science and art." *See also White*, 1993 WL 73915 at *4. The fair use doctrine is a means through which the Copyright Act balances incentives to authors to create original works against incentives to other authors to use these creations as building blocks for their own work. *See Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 547 (1985); *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980); *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458 (5th Cir.), *cert. denied*, 111 S. Ct. 374 (1990); *Computer*



*Associates International, Inc. v. Altai, Inc.*, 982 F.2d at 693, 721 (2d Cir. 1992). As the Court explained in *Stewart v. Abend*, 495 U.S. 207, 237 (1990) (citations omitted), fair use is an " 'equitable rule of reason' which permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster."

Parody occupies a special place in this balance, not only providing entertainment in its own right, but also giving a new or enlarged aspect to the original work being parodied. This is how art evolves.[4] Recognizing the value of parody, courts have long held "that parodists are entitled to borrow more from an author's work than other users." Yen, *supra*, at 84; *see also* Bisceglia, *supra*, at 33. Moreover, Congress specifically supported this sympathetic approach by listing parody as one of the uses courts should safeguard under the fair use doctrine. H. Rep. No. 1476, 94th Cong., 2d Sess. 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678-79; Yen, *supra*, at 84-85. Against all of these historical, legislative, and judicial currents, however, the Sixth Circuit disregarded the special role parody plays in the progress of the arts, and thus the "substantial freedom" it deserves under Section 107. *See Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).[5]

---

[4] The characteristic of inversion distinguishes parody from run-of-the-mill derivative works, which do not receive favored treatment under the fair use doctrine. The expression in the parody and the original work may be substantially similar on a superficial level, but they have divergent meanings.

[5] The Sixth Circuit's misapprehension of the "substantial free-

## II. COMMERCIAL PARODIES SHOULD NOT BE PRESUMED TO HAVE A HARMFUL MARKET IMPACT

In overturning the district court's finding of fair use, the Sixth Circuit attached great weight to the Court's holding in *Sony*, 464 U.S. at 449, that a use for a commercial purpose will presumptively harm the plaintiff. While the Sixth Circuit acknowledged that this presumption is rebuttable, its dismissal of the district court's findings favoring 2 Live Crew reflects the belief that the presumption is difficult, if not impossible, to overcome.

As this case demonstrates, the lower courts are having difficulty applying the presumption created by *Sony*.[6] Judge Nelson and several commentators have questioned the application of the presumption to "productive" commercial uses such as parody. 972 F.2d at 1443; Note, *The Parody Defense to Copyright In-*

---

dom" parody deserves is clearly illustrated by its analysis of the "amount and substantiality"—the third fair use factor—of the melody used by 2 Live Crew. In the Sixth Circuit's view, by using "the recognizable bass or guitar riff . . . eight times" 2 Live Crew took "the heart of the original and ma[de] it the heart of a new work" and thus "purloin[ed] a substantial portion of the essence of the original." 972 F.2d at 1438. For a parody to be successful, however, it must "conjure up" the original work, and it can do this only if it uses the "heart" or the "essence" of the original. If 2 Live Crew used a less central reference, its song would not have conjured up "Oh, Pretty Woman" and it would not have been a parody. *See Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980).

[6] This difficulty is exacerbated by the ambiguity of the term "commercial." *See* William W. Fisher, III, *Reconstructing the Fair Use Doctrine*, 101 Harv. L. Rev. 1661, 1673 (1988).



*fringement: Productive Fair Use After Betamax*, 97 Harv. L. Rev. 1395, 1408 (1984); Beth W. Van Hecke, *But Seriously Folks: Toward a Coherent Standard of Parody as Fair Use*, 77 Minn. L. Rev. 465, 489 (1992). *See also* Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 Harv. L. Rev. 1137, 1154 (1990). Accordingly, we respectfully suggest that the Court clarify that the presumption arising out of a commercial use does not apply to parodies.

In performing the fair use analysis, courts have historically favored "productive" uses, where the copier adds an original contribution to the copied work, over "non-productive" uses, where the copier appropriates the original without adding a socially valuable creative element. William F. Patry, *The Fair Use Privilege in Copyright Law* xi-xii (1985); *Sony*, 464 U.S. at 455 n.40. Because of parody's contribution to the progress of the arts, it is arguably the most productive of all possible uses.

Significantly, the Court first articulated the presumption that commercial uses harmed the market for the copyrighted work in *Sony*, a case involving a non-commercial non-productive use: home videotaping of television shows. Although the dissent argued that the use was unfair because it was non-productive, 464 U.S. at 480, the majority ruled that the use was fair notwithstanding its non-productive nature largely because it was non-commercial. *Id.* at 451. In the course of discussing the distinction between commercial and non-commercial uses, the majority stated that commercial uses were presumptively harmful. *Id.* at 451. It bears emphasis that the Court created this presumption in the context of a case involving a non-productive use.

In *Harper & Row*, the Court reiterated that commercial uses are presumptively harmful. 471 U.S. at 562. Like *Sony*, *Harper & Row* involved a non-productive use: reprinting a significant passage from President Ford's still unpublished memoirs with "the intended purpose of supplanting the copyright holder's commercially valuable right of first publication." *Id.*

To be sure, the Court applied the presumption of harm to a commercial productive use in *Stewart v. Abend*. 495 U.S. at 237. That case, however, involved the film version of a short story, a far less "productive" use than parody and a use far more likely to interfere with the market for the original work. With a use as productive as parody, the presumption is decidedly inappropriate. *See* Note, *supra*, at 1408 (the presumption is "sensible and appropriate only when applied to commercial *reproductive* uses") (emphasis in original). The presumption of unfairness skews the delicate fair use balance against the parodist and thus against society at large, that would benefit from the parody. *Id.*; *Sony*, 464 U.S. at 478. The presumption leads courts to place too much emphasis on the "commercial" nature of parody, and results in a truncated analysis such as that advanced in the decision below. *See* Bisceglia, *supra*, at 19. By clarifying that the presumption of harm should not apply to parodies, the Court will give parodists a fair shot at the fair use defense.

Additionally, it makes little sense to presume that a commercial parody would have a harmful market effect. Such a presumption may well be reasonable in most cases involving commercial uses because such uses likely would have the same function—and thus



the same market—as the original. A parody, however, typically has a completely different function from the original work, and thus does not "supplant[] any part of the normal market for the copyrighted work." S. Rep. No. 473, 94th Cong., 1st Sess. 65 (1975).[7] Accordingly, the presumption that a commercial use will have a harmful market effect should not apply to commercial parody.

---

[7] The Senate Report's language is also helpful in determining what weight, if any, should be given to the theoretical possibility of the copyright holder licensing the creation of a parody. Attaching undue significance to the copyright holder's loss of potential royalties for every conceivable use of the work would lead to the evisceration of the fair use defense. *See* Van Hecke, *supra*, at 485; II Paul Goldstein, *Copyright: Principles, Law and Practice* 10.2.2 at 236 (1989). Although a film version of a novel may be part of the novel's "normal market," a parody of the novel should not be so regarded because of its critical nature. *See* Yen, *supra*, at 90. Thus, the analysis of a parody's market effect should be limited to the "potential or actual commercial substitution of the parody for the original." Note, *supra*, at 1410; Van Hecke, *supra*, at 486.

Here, the 2 Live Crew version would be a commercial substitute for the Roy Orbison version only if the works had the same "basic melody" and "fundamental character." If the works did share these characteristics, the 2 Live Crew would be entitled to a compulsory license under 17 U.S.C. 115(a)(2). If they did not share these characteristics, then the 2 Live Crew's version would not have been a commercial substitute, and the fourth factor would have favored the challenged use.

## CONCLUSION

For the foregoing reasons, the Court should reverse the judgement of the Court below.[8]

Respectfully submitted,

ROBERT H. LOEFFLER*
JONATHAN BAND
MORRISON & FOERSTER
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006
(202) 887-1500

*Counsel for*
*The Harvard Lampoon, Inc.*

**Counsel of Record*

Dated: May 28, 1993

---

[8] Jonathan D. Canter, Esq. and S. Eric Rayman, Esq., members of the Lampoon's Graduate Board, assisted in the preparation of this brief.